

**SC 87154**

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**IN THE SUPREME COURT OF MISSOURI**

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**MISSOURI ASSOCIATION OF CLUB EXECUTIVES, INC., et al.**

**Respondent**

**v.**

**STATE OF MISSOURI,**

**Appellant**

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**APPELLANT'S BRIEF**

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## **JURISDICTIONAL STATEMENT**

The Missouri Association of Club Executives, Inc., (“MACE”) *et al.*, challenged the constitutionality of House Bill 972 (“HB 972”) on multiple grounds. The circuit court granted judgment in MACE’s favor, holding that HB 972 violated Article III, § 23's prohibition against multiple subjects and clear title, violated Article III, §21's prohibition against changing the purpose of a bill as introduced, and violated the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 2 and 8 of the Missouri Constitution. Because the issue on appeal is whether HB 972 violates Mo. Const. Article III, §§ 21 and 23, and the First and Fourteenth Amendments, this court has exclusive jurisdiction of this appeal. Mo. Const. Article V, § 3.

## **STATEMENT OF FACTS**

The Missouri Association of Club Executives, Inc. (“MACE”) filed a six-count petition in the circuit court, seeking a declaration that House Bill 972, passed by the 93<sup>rd</sup> General Assembly on May 13, 2005, violates the Missouri Constitution in various respects. LF 1, 66-77. The circuit court granted MACE relief on Counts I, II, III, and VI. LF 286-6.

In Count I, MACE alleged that HB 972 violated Mo. Const. Article III, § 21, in that, as finally passed, HB 972 changed its original purpose. LF 12-13. On April 1, 2005, HB 972, introduced by Representative Rod Jetton, was read for the first time. LF 30-41.

**1<sup>st</sup> version of HB 972 - Title “...relating to intoxication-related traffic offenses, with penalty provisions.”**

HB 972 proposed repeal of four statutory sections within Chapters 577 and 302, RSMo. LF 30-41. The title of HB 972 stated, “To repeal, [identifies 4 sections of Chapters 577 and 302,] and to enact in lieu thereof four new sections relating to intoxication-related traffic offenses, with penalty provisions.” LF 30. The original, officially printed House Bill 972 consisted of 12 pages. LF 30-41. The bill changed limited driving privileges for intoxication-related offenders; added the crime of aggravated vehicular manslaughter; and modified criminal offender definitions. LF 30-41.

**2<sup>nd</sup> version of HB 972 - Title “...relating to intoxication-related traffic offenses, with penalty provisions.”**



On April 14, 2005, the House Special Committee on General Laws reported “House Committee Substitute for House Bill 972,” (“2<sup>nd</sup> version of HB 972”) with a recommendation that the House Committee Substitute pass. LF 42. The House Committee changed the title to read as follows: “To repeal Sections 577.001 and 577.023, RSMo, and to enact in lieu thereof three new sections relating to intoxication-related traffic offenses, with penalty provisions.” LF 42.

The 2<sup>nd</sup> version of House Bill 972 contained the repeal of two of the same sections identified in the original HB 972, § 577.001 and §577.023. LF 42-46. It also included the enactment of three of the same four new sections as did the originally introduced HB 972, §§ 565.022, 577.001 and 577.023. LF 42-46. Of the amended sections in the original bill, only § 302.309 was not included in the 2<sup>nd</sup> version of HB 972. LF 42-46.

On April 28, 2005, the House Committee Substitute for House Bill 972 was taken up and perfected by the House of Representatives, without any changes. HB 47. The House then passed House Committee Substitute for HB 972 by a vote of 153-yes and 0-no on May 3, 2005. LF 47-51.

**3<sup>rd</sup> version of HB 972 - Title - “... relating to alcohol related offenses, with penalty provisions.**

On May 10, 2005, the Senate Committee on Judiciary and Civil and Criminal Jurisprudence reported Senate Committee Substitute for House Committee Substitute for HB 972 (hereinafter “3<sup>rd</sup> version of HB 972”) with the recommendation of do pass. LF 53-58.

The 3<sup>rd</sup> version of HB 972 contained seven pages, changed the title to “to repeal [sic] Sections 311.310, 565.024, 568.050 and 577.023, RSMo, and to enact in lieu thereof four new sections relating to alcohol related offenses, with penalty provisions.” LF 53-58. Only one of the four sections of this Substitute was included in the original HB 972. LF 53-58. The 3<sup>rd</sup> version of HB 972 contained provisions to repeal statutory sections relating to sales of alcohol to minors, voluntary manslaughter, endangering the welfare of a child and definitions of alcohol related offenders. LF 53-58.

**Final version of HB 972 - Title - “...relating to crime, with penalty provisions and an emergency clause for a certain section.”**

On May 12, 2005, the 3<sup>rd</sup> version of HB 972 was again brought to the floor and withdrawn by Senator Nodler with a Senate Substitute No. 2 (hereinafter “Final version of HB 972”) then offered by Senator Nodler. LF 66-77. The Final version of HB 972 contained 12 pages, changed the title of the bill to “to repeal sections 311.310, 565.024, 566.083, 568.050, 577.001, and 577.023, RSMo, and to enact in lieu thereof thirteen new sections relating to crime, with penalty provisions and an emergency clause for a certain section.” LF 66. The Final version of HB 972 repealed six sections, only one of which was in the original HB 972, and enacted thirteen new sections, of which only one was in

the 1<sup>st</sup> version of HB 972 and only two of which were in the 2<sup>nd</sup> version of HB 972 passed by the House. LF 66-77.

On May 12, 2005, the Senate third read and passed, with an emergency clause, the Final version of HB 972. LF 66-77. This bill was Truly Agreed and Finally Passed on May 13, 2005. LF 66-77. Governor Blunt signed HB 972 into law on July 13, 2005.<sup>1</sup>

In setting out the legislative purpose in Section 67.2552.5, the Missouri General Assembly relied on the experiences of other jurisdictions as to the conditions associated with adult entertainment businesses as set out in statutes or ordinances from those jurisdictions or case law relating to those statutes or ordinances. LF 164. In order to insure that the members of the General Assembly were aware of the experiences of other jurisdictions, Senator Matt Bartle distributed copies of several jurisdictions' studies of the adverse secondary effects of sexually oriented businesses to all members of the Missouri Senate and made it available to all members in the Missouri House in connection with the hearings on Senate Bill 32. LF 164.

### **Senate Bill 32's connection to HB 972**

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<sup>1</sup>A copy of HB 972 as Truly Agreed and Finally Passed can be found in the Appendix on pages A7-A18.

SB 32 contained language identical to the language in the Final version of HB 972 relating to regulation of sexually oriented businesses. LF 78-82. In addition to the restrictions in HB 972, it contained a tax on the gross receipts of sexually oriented businesses (“SOB”) and a prohibition on exhibiting films, videos, or DVDs depicting specified sexual activities. LF 78-82.

On January 24, 2005, the Senate Judiciary Committee conducted a hearing on Senate Bill 32. LF 161. Two months later, on March 29, 2005, Missouri Senate passed SB 32 by a 23-7 majority. LF 161. One month later, on April 21, 2005, the House Local Government Committee conducted a hearing on SB 32. LF 161.

### **The challenge to HB 972 at the trial court**

On August 8, 2005, MACE filed a six-count petition in the circuit court, seeking a declaration that House Bill 972, passed by the 93<sup>rd</sup> General Assembly on May 13, 2005, violates the Missouri Constitution in various respects. LF 1, 66-77. The circuit court granted MACE relief on Counts I, II, III, and VI. LF 286-6.

The circuit court heard oral argument on behalf of all parties on August 23, 2005, with the parties also simultaneously filing trial briefs on that date. LF 197-235, 236-239. On August 26, 2005, the circuit court held that HB 972 violated Mo. Const. Article III, § 21, by changing its original purpose from relating to the “problem of alcohol and intoxication” to regulations on sexually oriented businesses. LF 283. The circuit court further held that HB 972 violated Mo. Const. Article III, § 23, apparently because the court believed that HB 972 did not have a clear title and contained more than one subject.

LF 282-3. The court severed the provisions of HB 972 relating to sexually oriented businesses (§§ 67.2540, 67.2546, and 67.2552) from the remainder of HB 972 on the basis that the passage of those provisions violated Mo. Const. Article III, § 21 and 23.

The circuit court also held that § 67.2552 in HB 972 violated the equal protection clauses of the First and Fourteenth Amendments to the United States Constitution and Mo. Const. Article I, §§ 2 and 8 of the Missouri Constitution. It further held that the other sexually oriented business statutes in HB 972 (§§ 67.2540 and 67.2546) were not severable from § 67.2552 and declared that §§ 67.2540, 67.2546, and 67.2552 of HB 972 may not be applied to or enforced against Plaintiffs.

The State filed its notice of appeal on September 30, 2005. LF 287.

## **Point Relied On I**

**The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill did not change its original purpose, in that HB 972's original purpose was to create new crimes and enhance the penalties on existing crimes and its purpose remained the same throughout the legislative process.**

*C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000)

*Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994)

*Missouri State Med. Ass'n. v. Mo. Dept. of Health*, 39 S.W.3d 837 (Mo.banc 2001)

*Stroh Brewery Co. v. State*, 954 S.W.2d 323 (Mo.banc 1997)

Mo. Const. Article III, §§ 21 and 23

Section 67.2540, RSMo

Section 67.2546, RSMo

Section 67.2552, RSMo

## **Point Relied On II**

**The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill contained a clear title, in that the amendments pertaining to the criminal restrictions of sexually oriented businesses fairly relate to the subject of the bill (as described in the title, “relating to crime”); have a natural connection to that subject; and are a means to accomplish the law’s purpose.**

*Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994)

*Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 38 (Mo.bacn 1982)

*Westin Crown Plaza Hotel Co. v. May*, 664 S.W.2d 2 (Mo.banc 1984)

Mo. Const. Article III, §§ 21, 23 and 37

Sections 67.2540, 67.2546, 67.2552, 311.310, 565.024, 568.050, 577.001, and 577.023, RSMo

### **Point Relied On III**

**The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill contained a single subject, in that the amendments pertaining to the criminal restrictions of sexually oriented businesses fairly relate to the subject of the bill (as described in the title, “relating to crime”); have a natural connection to that subject; and are a means to accomplish the law’s purpose.**

*C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000)

*Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1994)

*Missouri State Med. Ass’n. v. Mo. Dept. of Health*, 39 S.W.3d 837 (Mo.banc 2001)

*Stroh Brewery Co. v. State*, 954 S.W.2d 323 (Mo.banc 1997)

Mo. Const. Article III, §§ 21 and 23

Sections 217.735.1, 311.310.2, 565.024.3, 575.205, and 577.023, RSMo



## Point Relied On IV

**The circuit court erred in holding that HB 972's age restriction on individuals entering sexually oriented businesses violated Mo. Const. Article I, §§ 2 and 8, and the equal protection clause of the Fourteenth Amendment or the free speech clause of the First Amendment, because HB 972 did not violate the plaintiffs' equal protection or free speech rights in that the age restriction on individuals entering sexually oriented businesses is a content-neutral regulation aimed at ameliorating the adverse secondary effects of sexually oriented businesses.**

*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (Souter, J., concurring)(1991)

*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986)(quoting from

*Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153, 1159 (1978))

*State v. Café Erotica, Inc.*, 500 S.E.2d 574 (1998)

*Young v. American Mini Theatres*, 427 U.S. 50, 71 n.34 (plurality opinion)(1976)

United States Constitution, First Amendment

United States Constitution, Fourteenth Amendment

Mo. Const. Article I, §§ 2 and 8

Sections 67.2540, 67.2552, 67.2552.4, 115.133, 431.055, and 431.060, RSMo

## **Point Relied On V**

**The circuit court erred in holding that §§ 67.2540, 67.2546, and 67.2552 are not severable from each other because the provisions are severable in that the non age-related restrictions on sexually oriented businesses in HB 972 are not so essentially and inseparably connected with the age restrictions on sexually oriented businesses such that it cannot be presumed that the legislature would have enacted the remaining restrictions without the age restrictions.**

*Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo.banc 1996)

*General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561 (Mo.banc 1998)

Sections 1.140, 67.2540, 67.2552, 67.2546, and 67.2552.4, RSMo

## Argument

### Standard of review

In reviewing a court-tried civil case, this court must uphold the decision of the trial court unless there is no substantial evidence to support the decision, the decision is against the weight of the evidence, or the trial court has erroneously declared or applied the law.<sup>2</sup> Counts I, II, III, and VI, of the Plaintiff's Petition involved pure questions of law. Where the issue on appeal is not the sufficiency of the evidence, the appellate court is not bound and need not defer to the circuit court's conclusions as to the legal effect of its findings of fact.<sup>3</sup> If the court-tried case is one in which, (1) the facts are derived from the pleadings, stipulations, exhibits, and depositions or, (2) the evidence is not controverted and the case is virtually one of admitted facts or, (3) the evidence is not in conflict, then no deference is due the circuit court's judgment.<sup>4</sup>

In performing its review, the court presumes that a statute is constitutional, and construes any doubts regarding that statute in favor of its constitutionality.<sup>5</sup> Unless an act "clearly and undoubtedly" violates constitutional limitations, that act shall be upheld.<sup>6</sup>

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<sup>2</sup>*Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

<sup>3</sup>*Case v. Universal Underwriters Insurance Co.*, 534 S.W.2d 635, 637 (Mo.App.1976).

<sup>4</sup>*Southgate Bank and Trust Co. v. May*, 696 S.W.2d 515, 519 (Mo.App.1976).

<sup>5</sup>*Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984).

<sup>6</sup>*Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

## Point Relied On I

**The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill did not change its original purpose, in that HB 972's original purpose was to create new crimes and enhance the penalties on existing crimes and its purpose remained the same throughout the legislative process.**

The circuit court held that the provisions in HB 972 adding sections regarding regulation of sexually oriented businesses resulted in a change of HB 972's purpose in violation of Mo. Const. Article III, § 21. In doing so, the circuit court misapplied the “change of purpose” analysis to HB 972, which led to the wrong answer.

The Missouri supreme court has always reviewed legislative compliance with Mo. Const. Article III, § 21 by taking a realistic review, rather than the narrow approach applied by the circuit court. The change of purpose prohibition is “designed to prevent the enactment of statutes in terms so blind that legislators themselves ... (would be) ... deceived in regard to their effect, and the public, from difficulty in making the necessary examination and comparison.”<sup>7</sup> The change in purpose prohibition is not designed to “inhibit the normal legislative process, in which bills are combined and additions necessary to comply with legislative intent are made.”<sup>8</sup> The test for compliance with

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<sup>7</sup>*Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 38 (Mo. banc 1982).

<sup>8</sup>*Blue Cross Hosp. Service, Inc. of Missouri v. Frappier*, 681 S.W.2d 925, 929 (Mo. banc 1984).

Mo. Const. Article III, § 21 is whether all of the provisions of a bill fairly relate to the subject expressed in its title, have natural connections therewith, or are "incidents or means to accomplish" the expressed purpose.<sup>9</sup> Amendments that are germane and reasonably relate to the object of legislation are not prohibited, even if those amendments introduce new matter to the underlying bill.<sup>10</sup> In *C.C. Dillon Co. v. City of Eureka*<sup>11</sup>, the court interpreted the purpose of a statute with a title "relating to transportation" to include local control of billboards in concluding there was no constitutional violation.<sup>12</sup>

A dispassionate and reasoned analysis of the standards established by the court is necessary to prevent an inadvertent reversal of the discretion that is properly lodged in the legislative process. The authority of a reviewing court is to interpret statutes, not make them.<sup>13</sup> But that is precisely what the circuit court did in this case.

The circuit court adopted Plaintiffs' argument that HB 972's original purpose was to effect changes strengthening the laws relating to alcohol intoxication-related traffic offenses. LF 282-3. The circuit court contrasted the original bill that involved toughening the criminal penalties for intoxication-related involuntary manslaughter, to the

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<sup>9</sup>*Blue Cross Hosp.*, 618 S.W.2d at 929; *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994).

<sup>10</sup>*Lincoln Credit Co.*, 636 S.W.2d at 38.

<sup>11</sup> *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. banc 2000).

<sup>12</sup>*Id.* at 327.

<sup>13</sup>*Eckenrode v. Dir. of Revenue*, 994 S.W.2d 583 (Mo. Ct. App. 1999).

enacted bill's additional provisions related to adding new restrictions on sexually oriented businesses and criminal penalties associated therewith. LF 283. The circuit court erroneously held that the expansion of HB 972 impermissibly changed the purpose of the bill because it interpreted the original purpose too narrowly. LF 283.

The circuit court misapplied the law and Plaintiffs failed to clear the hurdles to justify overturning the legislative decision. In *C.C. Dillon Co.*, this court reiterated that it will liberally interpret the purpose of a statute to try to find no constitutional violation.<sup>14</sup> During the legislative process described in that case, several amendments were added to statutory sections that were not included in the original bill.<sup>15</sup> The court interpreted the purpose of a bill with a title “relating to transportation” to include local control of billboards in concluding there was no constitutional violation.<sup>16</sup> Additionally, in *Missouri State Med. Ass’n v. Mo. Dept. of Health*, the supreme court held that a title change from “relating to insurance coverage for cancer early detection” to one of “relating to health services” was appropriate, as were several additions to the bill involving health services.<sup>17</sup>

Like the bills at issue in *C.C. Dillon* and *Missouri State Medical Association*, HB 972's purpose, and corresponding title, was changed from being restricted to one type of

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<sup>14</sup>*C.C. Dillon Co.*, 12 S.W.3d at 325.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 327.

<sup>17</sup> *Missouri State Med. Ass’n v. Mo. Dept. of Health*, 39 S.W.3d 837, 840 (Mo. banc 2001).

crime (“relating to intoxication related traffic offenses”) to crime more generally, *i.e.* “relating to crime.” The original HB 972, the Truly Agreed to and Finally Passed bill, and SB 32 dealt with criminal law, specifically creating new crimes and enhancing the penalties on existing crimes. Both bills, therefore, dealt with crime. While the amendments to HB 972 did introduce new crimes and penalties, it did not involve a challenge in purpose as contemplated by Mo. Const. Article III, § 21.

A notable example of the court’s deference to the legislative process is *Stroh Brewery Co. v. State*.<sup>18</sup> There the court considered a bill that as introduced contained one section “relating to the auction of vintage wine, with penalty provisions.”<sup>19</sup> During the legislative process, that bill took on additional amendments and eventually grew to nine sections, including the original section relating to vintage wine and other topics such as marketing of alcohol, Sunday licenses for sale of alcohol, age requirements for sellers of alcohol, labeling requirements for malt liquor, and additional penalties for violations of the Liquor Control Law.<sup>20</sup> Due to these expanding amendments, the finally passed bill was entitled “an act . . . relating to intoxicating beverages.”<sup>21</sup>

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<sup>18</sup>954 S.W.2d 323 (Mo. banc 1997).

<sup>19</sup>*Id.*, 954 S.W.2d at 325.

<sup>20</sup>HCS/SB 933 (1996).

<sup>21</sup>*Stroh*, 954 S.W.2d at 325.

In *Stroh*, the court recognized that the original purpose of a bill must be determined at the time of introduction.<sup>22</sup> Even though the original bill dealt only with the auction of vintage wine, the court held that other sections relating to liquor control could be added without changing its original purpose, even if the title was expanded, when those sections were generally consistent with the overarching purpose of liquor control.<sup>23</sup> By the same token, all the changes that were added to HB 972 fairly relate to crime, which was the original purpose of the bill, and deference is to be given to the legislature's decisions.

The court held in *Stroh* that only clear and undoubted language limiting the purpose will support an Article III, § 21 challenge.<sup>24</sup> Deference is to be afforded legislative determinations to change the law.<sup>25</sup> The original title of HB 972 did not contain the type of limiting language such as “for the sole purpose of,” as was noted by the court in *Stroh*.<sup>26</sup> Therefore, the additions to the bill did not change its purpose. Based upon these prior holdings, it is evident that there was no change in purpose in derogation of Article III, § 21. Accordingly, this court should reverse the circuit court's decision

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<sup>22</sup>*Id.*, 954 S.W.2d at 326.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Missouri State Med. Ass'n*, 39 S.W.2d at 839. *See also, C.C. Dillon Co.*, 12 S.W.3d at 327.

<sup>26</sup>*Stroh*, 954 S.W.2d at 326.



holding that §§ 67.2540, 67.2546, and 67.2552 found in Senate Substitute No. 2 for SCS HCS HB 972 are unconstitutional under Article III, § 21 of the Missouri Constitution.

### **Point Relied On II**

**The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill contained a clear title, in that the amendments pertaining to the criminal restrictions of sexually oriented businesses fairly relate to the subject of the bill (as described in the title, “relating to crime”); have a natural connection to that subject; and are a means to accomplish the law’s purpose.**

Mo. Const. Article III, § 23 provides: “No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in § 37 of this article and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.”

The standards for reviewing legislation when a challenge is based upon a clear title challenge are similar to the standards for reviewing a change of purpose challenge.<sup>27</sup> As stated previously, the circuit court apparently held that HB 972 violated Mo. Const. Article III, § 23 because the title “relating to crime” was under-inclusive by including criminal regulation of SOBs and over-inclusive by not fairly apprizing the legislature of the contents of the bill. LF 282-4. Attacks against legislative action founded on constitutionally-imposed procedural limitations are not favored, and such limitations are

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<sup>27</sup> *Westin Crown Plaza Hotel Co.*, 664 S.W.2d at 5.

interpreted liberally to uphold the action, unless it clearly and undoubtedly violates such limitations and courts have consistently avoided interpretations that will limit or cripple legislative enactments any further than is made necessary by the absolute requirements of the law.<sup>28</sup>

The title of HB 972 was neither under nor over inclusive. As detailed above, HB 972's purpose and subject was criminal regulation. The provisions of HB 972 relating to SOBs added criminal penalties for sexually oriented businesses (“SOBs”) allowing specified criminal activity to take place in their establishments and criminalized conduct such as nude dancing and touching of customers by SOB employees. As such, HB 972's title of “relating to crime” is not under-inclusive.

Neither is HB 972's title over-inclusive. The bill advised the legislators what it contained. The complete title of HB 972 was “To repeal §§ 311.310, 565.024, 568.050, 577.001, and 577.023, RSMo, and to enact in lieu thereof thirteen new sections relating to crime, with penalty provisions and an emergency clause for a certain section.” The new criminal regulations on SOBs relate to crime by criminalizing certain conduct by SOBs, their employees, and their customers.

It is appropriate to change the title of an act during the legislative process when additional provisions are added to the act, particularly when the new title reflects the

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<sup>28</sup>*Hammerschmidt*, 877 S.W.2d at 102.

general contents of the bill.<sup>29</sup> Changes in a bill's title are necessary to accurately reflect the real scope of the legislation.<sup>30</sup> The amendments to HB 972, coupled with the title change, did not violate the clear title requirement. The title certainly was not under or over-inclusive when it included "relating to crime" in its title because the regulation of SOBs were criminal restrictions on the business. Therefore, the bill contained a clear title as required by Article III, § 23. Accordingly, this court should reverse the circuit court's declaration that §§ 67.2540, 67.2546, and 67.2552 found in Senate Substitute No. 2 for SCS HCS HB 972 is unconstitutional under Article III, § 23 of the Missouri Constitution.

### **Point Relied On III**

**The circuit court erred in holding that HB 972 violated Mo. Const. Article III, § 21, because the bill contained a single subject, in that the amendments pertaining to the criminal restrictions of sexually oriented businesses fairly relate to the subject of the bill (as described in the title, "relating to crime"); have a natural connection to that subject; and are a means to accomplish the law's purpose.**

The circuit court applied the wrong analysis to HB 972 on Plaintiff's "multiple subject" challenge, and got the wrong answer. Essentially, the circuit court asked: Do all of the provisions of HB 972 relate *to each other*? This court has consistently applied a test that is more practical and faithful to the language of Mo. Const. Article III, § 23,

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<sup>29</sup> *Westin Crown Plaza Hotel Co.*, 664 S.W.2d at 6-7.

<sup>30</sup> *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 38 (Mo. banc 1982).

asking: Do all of the provisions of the bill fairly relate *to the subject of the bill* as expressed in the bill's title?

With certain exceptions not relevant here, Article III, § 23 requires that “[n]o bill shall contain more than one subject which shall be clearly expressed in its title[.]” This court has, in interpreting and applying this section, employed a practical test that respects the manner in which the co-equal legislative branch performs its critical role.<sup>31</sup>

This court has, historically, recognized that the words “one subject” in Article III, § 23 must be “broadly read.”<sup>32</sup> Based on cases stretching to at least 1869, this court has held that “‘subject’ within the meaning of Article III, § 23, includes all matters that fall within or reasonably relate to the general core purpose of the proposed legislation.”<sup>33</sup> Thus, this court has consistently applied the following rule to challenges under Article III, § 23: The law will be upheld if “all provisions of the bill fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its

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<sup>31</sup> See *Hammerschmidt*, 877 S.W.2d at 102 (attacks based the constitution's procedural limitations are “not favored” because the court “ascribe[s] to the General Assembly the same good and praiseworthy motivations as informed [the court's] decision-making process”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*, citing *State v. Mathews*, 44 Mo. 523 (1869).

purpose.”<sup>34</sup> In determining the “subject” or “purpose” of a bill, this court looks to the purpose articulated in the bill’s clear title.<sup>35</sup>

Throughout its multiple subject jurisprudence, this court has faithfully applied this test. In *Missouri State Medical Association v. Missouri Department of Health*, this court rejected a “multiple subject” challenge.<sup>36</sup> The court did not inquire as to whether the challenged sections (relating to health insurance, medical records, and pre-operation information on breast implantations ) were reasonably related to each other or to other provisions of the bill.<sup>37</sup> Instead, the court found that these provisions “are (at least) incidents or means to” the purpose or subject of the bill as expressed in the title, *i.e.*, “health services.”<sup>38</sup>

Similarly, in *Stroh Brewery Co. v. State*, this court rejected a multiple subject challenge by determining whether the challenged sections were reasonably related to the

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<sup>34</sup>*Id.*, quoting *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 6 (Mo. banc 1984).

<sup>35</sup>*Hammerschmidt*, 877 S.W.2d at 102.

<sup>36</sup>*Missouri State Medical Association v. Missouri Department of Health*, 39 S.W.3d 837, 840-841 (Mo. banc 2001).

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

purpose or subject of the bill as expressed in its title.<sup>39</sup> There, because the purpose or subject of the bill was “intoxicating beverages,” the court upheld the law on the ground that each of the challenged provisions was in the liquor control chapter (Chapter 311, RSMo) and thus must fairly relate to “intoxicating beverages.”<sup>40</sup>

In *Westin*, the plaintiffs claimed that a bill that originally related only to “fees and compensations of state and local registrars of vital statistics” violated Article III, § 23, by including provisions that created new fees for tests performed by the Department of Health and increased fees for hospitals, surgical centers, and even hotels and motels.<sup>41</sup> This court rejected that challenge, and held that the purpose of the bill was to be found in the title as passed, *i.e.*, “relating to certain fees relating to the division of health.”<sup>42</sup> Thus, the court held that all of the challenged provisions, even those “matters strictly beyond fees... have a natural connection with and are incidental to accomplishing this single purpose.”<sup>43</sup>

In the cases discussed above, and all their predecessors and successors, this court has looked to the relationship between the challenged sections and the purpose of the bill as expressed in its title. Not only has this court never applied that test as articulated by

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<sup>39</sup>*Stroh Brewery Co. v. State*, 954 S.W.2d 323, 327 (Mo. banc 1997).

<sup>40</sup>*Id.*

<sup>41</sup>*Westin*, 664 S.W.2d at 5.

<sup>42</sup>*Id.* at 4, 6.

<sup>43</sup>*Id.* at 6.

the circuit court in this matter, *i.e.*, whether the challenged sections fairly related to each other and to the other sections of the bill, this court has squarely rejected that approach on several occasions. In *Fust v. Attorney General*, the plaintiffs argued that a bill that tried to regulate liability insurance carriers, modify the tort liability of manufacturers, regulate pre-judgment interest, modify trial procedures for cases involving punitive damages, and establish a state tort victims' compensation fund must have more than one subject.<sup>44</sup> This court rejected the challenge:

[T]he single subject test is *not* whether individual provisions of a bill relate to each other. The constitutional test focuses on the subject set out in the title. We judge whether [the challenged provision] fairly relates to the subject described in the title of the bill, has a natural connection to the subject, or is a means to accomplish the law's purpose.<sup>45</sup>

As noted above, the circuit court asked the wrong question in this case . . . and got the wrong answer.

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<sup>44</sup>*Fust v. Attorney General*, 947 S.W.2d 424, 428 (Mo. banc 1997).

<sup>45</sup>*Id.* (emphasis added). *See also C.C. Dillon Company v. City of Eureka*, 12 S.W.3d 322, 328 (Mo. banc 2000) (the “multiple subject” test “does not concern the relationship between the individual provisions, but between the individual provision and the subject as expressed in the title).

### **HB 972 contained a single subject**

As discussed, the first step in resolving Plaintiff's claim that the sexually oriented business amendments violate Article III, § 23 is to determine the purpose or subject of the bill. The title of HB 972 clearly sets forth that the purpose or subject of that bill is "relating to crime." LF 66. Thus, the only question in this case is whether the SOB amendments "fairly relate" to crime, have a "natural connection to" crime, or are "a means to accomplish" relative to crime. They do.

HB 972 consists solely of provisions enhancing existing criminal penalties on intoxication-related driving offenses as well as criminalizing new conduct relating to the operation of sexually oriented businesses. For instance, it has provisions governing the Board of Probation and Parole's supervision of prior sex offenders and a provision making it a crime for a property owner to knowingly allow a person under the age of twenty-one to drink or possess intoxicating liquor. LF 69-70 (§§ 217.735.1, 311.310.2).

It also contains sections defining the crime of involuntary manslaughter in the first degree while operating a motor vehicle in an intoxicating condition, creates the crime of the tampering with electronic monitoring equipment, and changes the definition of an "aggravated offender" for intoxication-related traffic offenses. LF 71, 73-4 (§§ 565.024.3, 575.205, 577.023). These sections, and others in HB 972, add to or revise the many statutes relating to the criminal law. Some provisions criminalize new conduct relating to SOBs, while other provisions change existing definitions in the criminal law or add new crimes relating to intoxicated-related traffic offenses. Although its title is



somewhat broad (“relating to crime”), it is clear that all of the provisions and the SOB amendments in HB 972 fairly relate to crime and are a means to accomplish the legislature’s goal in adding to or revising Missouri’s criminal law.

The SOB amendments contained in HB 972 comport with the single subject of the bill, relating to crime, and are fairly related to and connected with that subject, and a means to accomplish the law’s purpose. In this regard, the bill is in no significant respects different from the bills upheld, as against multiple subject challenges, in the *Missouri State Medical Association*, *Stroh Brewery*, *Westin*, *Fust*, and *C.C. Dillon*, cases, *supra*. This bill should similarly be upheld. Accordingly, this court should reverse the circuit court’s declaration that §§ 67.2540, 67.2546, and 67.2552 found in Senate Substitute No. 2 for SCS HCS HB 972 is unconstitutional under Article III, § 23 of the Missouri Constitution.

#### **Point Relied On IV**

**The circuit court erred in holding that HB 972’s age restriction on individuals entering sexually oriented businesses violated Mo. Const. Article I, §§ 2 and 8, and the equal protection clause of the Fourteenth Amendment or the free speech clause of the First Amendment, because HB 972 did not violate the plaintiffs’ equal protection or free speech rights in that the age restriction on individuals entering sexually oriented businesses is a content-neutral regulation aimed at ameliorating the adverse secondary effects of sexually oriented businesses.**

The circuit court held that age restrictions on § 67.2552.4 violated the plaintiffs' Equal Protection and First Amendment rights. Plaintiffs argued to the circuit court that there was no rational basis to treat persons over 18 and under 21 differently from persons over 21 years old for purposes of employment or patronizing SOBs. This is false. There is a rational basis for the age restriction: it combats the adverse secondary effects of SOBs and is not directed at the expressive nature of the conduct.

SOBs are not good neighbors. They create special problems for the community, ranging from merely sordid to very serious. There is a “higher incidence of prostitution and sexual assault in the vicinity of adult entertainment locations.”<sup>46</sup> Responsible government officials who have studied the issue have rationally concluded that “a concentration of ‘adult’ movie theaters causes the area to deteriorate and become a focus of crime”<sup>47</sup> and that “the presence of adult motion picture theaters” has “adverse effects” on both “neighborhood children and community improvement efforts.”<sup>48</sup>

Likewise, “sexually oriented businesses can exert a dehumanizing influence on persons attending churches or schools, can contribute to an increase in criminal activity, can contribute to the impairment of character and quality of residential neighborhoods,

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<sup>46</sup>*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 586 (Souter, J., concurring)(1991).

<sup>47</sup>*Young v. American Mini Theatres*, 427 U.S. 50, 71 n.34 (plurality opinion) (1976).

<sup>48</sup>*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986)(quoting from *Northend Cinema, Inc. v. Seattle*, 585 P.2d 1153, 1159 (1978)).

and, when concentrated in one area, can contribute to a decline in value of surrounding property.”<sup>49</sup> SOBs can also cause “noise, excessive parking, and the presence of discarded sexually oriented materials on residential lawns.”<sup>50</sup> Those establishments providing closed viewing booths can contribute to unsanitary or unhealthy conditions including “the spread of AIDS and other communicable diseases through the unprotected, promiscuous sexual activity that can occur within the privacy of closed booths.”<sup>51</sup>

In First Amendment jurisprudence, these adverse consequences of SOBs are called “undesirable [or adverse] secondary effects.”<sup>52</sup> These effects are called “secondary” to distinguish them from the effects of the constitutionally protected *content* of the erotic and sexually oriented messages or conduct that these establishments convey. Although many persons among our citizenry oppose and might seek to suppress both the secondary effects *and* the content of SOBs and other messages that adult entertainment establishments convey, the challenged provisions in HB 972 are focused exclusively and permissibly on the adverse secondary effects of such businesses. A government

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<sup>49</sup> *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1272 (5th Cir. 1988), *cert. den.* 489 U.S. 1052 (1989).

<sup>50</sup> *Mitchell v. Com’n on Adult Entertainment Est.*, 10 F.3d 123, 136 (3d Cir. 1993).

<sup>51</sup> *Id.* at 140.

<sup>52</sup> *Renton*, 475 U.S. at 49.

regulation whose “predominant concern” is to ameliorate, curb, or prevent adverse secondary effects is “unrelated to the suppression of free expression.”<sup>53</sup>

The United States supreme court has required a deferential standard of judicial review of a statute or municipal law which regulates protected, albeit sexually explicit speech, but whose predominant purpose is amelioration of adverse secondary effects of the sexually explicit materials. This standard applies even if the law is not literally “content-neutral,” *i.e.*, even if it “treat[s] adult [entertainment establishments] differently from other [establishments that are not sexually oriented] and . . . the classification [of the law’s application] is predicated on the *content* of materials shown in the respective [establishments].”<sup>54</sup> This court should review the law as though it were “content-neutral” even if it is not literally content-neutral because the law is “*justified* without reference to the content of the regulated speech.”<sup>55</sup> Thus, the reviewing court should evaluate the law under the more deferential content-neutral time, place, and manner standard.<sup>56</sup> Under this standard, the regulation is valid if it is narrowly tailored to serve a significant or

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<sup>53</sup> *Id.* at 47, 48.

<sup>54</sup> *Young v. American Mini Theatres*, 427 U.S. 50, 63 (1976); emphasis added

<sup>55</sup> *Renton*, 475 U.S. at 48 (emphasis in the original).

<sup>56</sup> *American Mini Theatres*, 427 U.S. at 70-72; *Renton*, 475 U.S. at 46-49; *Barnes*, 501 U.S. at 566 (1991) (plurality opinion).

substantial government interest and if it allows for reasonable alternative avenues of communication.<sup>57</sup>

The proper standard for review of age discrimination challenges under the Equal Protection clause is the “rational basis” test.<sup>58</sup> In *Craig v. Boren*, the U.S. supreme court indicated that the question of whether to raise or lower the age of majority relative to the state of Oklahoma’s drinking age was primarily an issue of state law.<sup>59</sup> In *Burnett v. San Francisco Police Dept.*, the California court of appeals held that a municipal ordinance restricting access of persons under the age of 21 to after-hours clubs did not restrict those persons’ exercise of a fundamental right of association and assembly and did not require strict scrutiny for purposes of equal protection analysis under the U.S. and California Constitutions.<sup>60</sup> Instead, the court examined whether the ordinance’s age classification bore a rational relationship to a legitimate state purpose.<sup>61</sup>

Because plaintiffs argued and the circuit court agreed, that § 67.2552.4 treats employees and customers of SOBs and employees and customers of non-SOBs differently, it is important to note that in addition to enjoying a deferential standard of

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<sup>57</sup>*Renton*, 475 U.S. at 50-52; *Mitchell*, 10 F.3d at 130 & n.7; *SDJ, Inc.*, 837 F.2d at 1273.

<sup>58</sup>*Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991).

<sup>59</sup>*Craig v. Boren*, 429 U.S. 190 (1976).

<sup>60</sup>*Burnett v. San Francisco Police Dept.*, 36 Cal.App.4th 1177 (1995).

<sup>61</sup>*Id.*

First Amendment review, laws whose predominant purpose is the amelioration of adverse secondary effects also enjoy a deferential standard of Equal Protection review. It does not matter under Equal Protection analysis that these laws regulate only sexually oriented, but not other businesses -- in other words, that these laws are not literally “content-neutral” but are instead “content-based” -- because there is clearly a rational basis for that distinction. More significant, it generally does not matter that these laws regulate some, but not all sexually oriented businesses. That the jurisdiction “chose first to address the potential problems created by one particular kind of adult business in no way suggests that the [jurisdiction] has ‘singled out’ [that particular kind of business] for discriminatory treatment.”<sup>62</sup> Experience may motivate the jurisdiction to include the omitted businesses at some time in the future.<sup>63</sup>

Plaintiffs and the circuit court placed a great deal of importance on the State of Georgia’s supreme court decision in *State v. Café Erotica, Inc.*<sup>64</sup> But *Café Erotica* is easily distinguishable from Missouri’s regulation. In *Café Erotica*, the State of Georgia enacted a statute making it unlawful for 21 year old persons to enter premises “whereon there is exhibited a show or performance which is harmful to minors and which...consists

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<sup>62</sup>*Renton*, 475 U.S. at 52-53.

<sup>63</sup>*Id.* at 53. *See also id.* at 55 n.4. (“Respondents [sexually oriented businesses] can fare no better under the Equal Protection Clause than under the First Amendment itself.”)

<sup>64</sup>*State v. Café Erotica, Inc.*, 500 S.E.2d 574 (1998).

of sexually explicit nudity on the part of one or more live performers.”<sup>65</sup> The Georgia supreme court found that this was content based restriction on speech and applied strict scrutiny to its analysis of the regulation.<sup>66</sup> Missouri’s regulation could not be more different from the regulation in *Café Erotica*. Missouri’s statute makes it a class A misdemeanor for a person to knowingly allow a person under 21 years of age on the premises of a SOB. Whereas Georgia’s statute was clearly directed at the content of speech (i.e. it was focused on specific sexual shows harmful to minors), Missouri’s statute simply raises the age from which a person may enter an SOB. Furthermore, the statute in *Café Erotica* was not addressed at combating adverse secondary effects. As has been established by Missouri, its statute is clearly focused on combating adverse secondary effects. Accordingly, plaintiffs’ reliance on *Café Erotica* is misplaced.

The state of Missouri has made distinctions based upon age in several contexts, most prominently in the area of the consumption of alcohol.<sup>67</sup> If 18 year olds are allowed to work at and patronize SOBs, it is more likely that individuals under the age of 18 will make their way into SOBs. As has been noted by the United States supreme court, individuals under the age of 18 demonstrate “[a] lack of maturity and an underdeveloped sense of responsibility,” are “more vulnerable or susceptible to negative influences and

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<sup>65</sup>*Id.* at 486-7.

<sup>66</sup>*Id.* at 489-90.

<sup>67</sup>Right to vote, §115.133 RSMo; legal age to contract § 431.055 & 431.060 RSMo, *etc.*

outside pressures,” and the “character of a juvenile is not as well formed as that of an adult.”<sup>68</sup> Missouri has made the public policy decision that preventing the adverse secondary effects of harm to minors will be combated by preventing them from entering SOBs.

Courts have upheld local ordinances requiring some SOBs to be dispersed away from churches, schools, and residential locations.<sup>69</sup> Courts have upheld hours-of-operation laws similar to the ordinances requiring the businesses to close at night and on Sundays and holidays.<sup>70</sup> Courts have upheld laws prohibiting secluded booths that facilitate sexual activity.<sup>71</sup> Finally, courts have upheld laws similar to the law in this case limiting the number, size, and content of exterior signs.<sup>72</sup> The fact that § 67.2552.4 treats employees and customers of SOBs “differently” than other businesses does not violate plaintiffs Equal Protection or First Amendment rights. The Missouri legislature has made the decision that raising the age of customers and employees who may enter or work at SOBs from 18 to 21 will combat the adverse secondary effects associated with SOB, including reducing crime and prostitution. Section 67.2552.4 is a

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<sup>68</sup>*Roper v. Simmons*, 543 U.S. 551, 569 (2005).

<sup>69</sup>*Renton*, 475 U.S. at 44; *SDJ, Inc.*, 837 F.2d at 1272.

<sup>70</sup>*Mitchell*, 10 F.3d at 139; *Star Satellite, Inc. v. Biloxi*, 779 F.2d 1074, 1077, 1079 (5th Cir. 1986).

<sup>71</sup>*Mitchell*, 10 F.3d at 142-44.

<sup>72</sup>*SDJ, Inc.*, 837 F.2d at 1272, 1278.



content-neutral regulation aimed at ameliorating the adverse secondary effects of sexually oriented businesses that does not violate plaintiffs' First Amendment or Equal Protection rights. Accordingly, this court should reverse the circuit court's declaration that the age restrictions in §§ 67.2540 and 67.2552 violate the First and Fourteenth Amendment to the United States Constitution and Mo. Const. Article I, §§ 2 and 8 of the Missouri Constitution.

### **Point Relied On V**

**The circuit court erred in holding that §§ 67.2540, 67.2546, and 67.2552 are not severable from each other because the provisions are severable in that the restrictions on sexually oriented businesses (those not the age restrictions) in HB 972 are not so essentially and inseparably connected with the age restrictions on sexually oriented businesses such that it cannot be presumed that the legislature would have enacted the remaining restrictions without the age restrictions.**

The circuit court held that the restrictions on nude dancing, nuisance criminal activity at SOBs, restrictions on the exhibition of specified sexual activities, and prohibitions on SOB employees touching customers (§§ 67.2540, 67.2546, & 67.2552) were not severable from the age restriction contained in § 67.2552.4. LF 286. The circuit court made specific finding as to why the provisions were not severable, nor did it offer any explanation as to why the provisions were not severable.

Section 1.140 provides:

The provisions of every statute are severable. If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

This court has interpreted §1.140 RSMo to mean that all statutes are presumptively severable.<sup>73</sup> Furthermore, the statutory doctrine of severability permits one offending provision of a law to be stricken and the remainder to survive.<sup>74</sup> In *Akin*, this court held that provisions of the SB 380 education act were unconstitutional and it severed the unconstitutional provisions from the remaining provision establishing educational programs and increasing taxes.<sup>75</sup> In *Akin*, the court noted that one method the legislature

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<sup>73</sup>*General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561, 568 (Mo.banc 1998).

<sup>74</sup>*Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo.banc 1996).

<sup>75</sup>*Id.* at 300-1.

uses to signal its intent as to what provisions are severable is to segregate a bill into separate sections.<sup>76</sup>

With the strong presumption of severability set forth in statute and case law, it is clear that the legislature intended for the age restriction in § 67.2552.4 to be severable from the other restrictions on SOBs by putting the provisions in a different section and subsection from the other restrictions. The age restriction was placed in a separate section from the definitions contained in § 67.2540 and the viewing restrictions in § 67.2546, and in a separate subsection from the nudity and touching restrictions in § 67.2552. LF 66-9. Furthermore, the age restriction is substantively unique from the other restrictions on SOBs in HB 972. The provisions of §§ 67.2540, 67.2546, and 67.2552 are neither contingent upon the age restriction in 67.2552.4, nor do they have anything in common with the age restriction other than they regulate SOBs. Therefore, it cannot be said that the age restriction is “so essentially and inseparably connected with, and so dependent upon” the other SOB regulations that it cannot be presumed that the legislature would not have enacted the SOB regulations without the age restriction.<sup>77</sup> Accordingly, in the event this court upholds the circuit court’s declaration that § 67.2552.4 violates the U.S. and Missouri Constitutions, this court should reverse the circuit court and order the remaining SOB regulations severable from the age restriction.

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<sup>76</sup>*Id.* at 301.

<sup>77</sup>*Id.*

### **Conclusion**

For the reasons stated above, the court should reverse the circuit court's judgment declaring that HB 972 violated Mo. Const. Article III, §§ 21 and 23, that the age restrictions on individuals entering sexually oriented businesses violated the First and Fourteenth Amendments, and that the age restrictions could not be severed from the remaining restrictions on sexually oriented businesses.

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify:

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2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a  
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